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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 201

WILBUR PENZIEN, JAMES KANDT, LAWRENCE DE PEW, MARGARET SINGLER, et al.,
Petitioners,
v.
DIELECTRIC PRODUCTS ENGINEERING COMPANY, INC., a Michigan corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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Petitioners* pray that a writ of certiorari issue to review the judgment of the Supreme Court of Michigan entered in the above-entitled case on January 5, 1965.

*Petitioners other than those named in the caption are Edward Summers, Bernhard Stark, and Local No. 990, of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, a voluntary unincorporated association. The individual petitioners commenced this action individually and on behalf of a class similarly situated.

CITATIONS TO OPINIONS BELOW

The oral opinion of the Circuit Court for the County of Macomb, Michigan, (R. 206a-213a)** is unreported and is printed in Appendix A hereto, *infra* p. 28. The majority and minority opinions of the Supreme Court of the State of Michigan, printed in Appendix A hereto, *infra*, pp. 17-27, are reported in 374 Michigan 444.

JURISDICTION

The judgment of the Supreme Court of the State of Michigan, affirming the trial court, was entered January 5, 1965, Appendix A, *infra*, p. 27. On March 29, 1965, an order was entered by this Court granting an extension of time within which to file a petition for certiorari to June 4, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since a title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

**References designated "R." refer to the appendix record filed by petitioners in the Supreme Court of Michigan.

QUESTIONS PRESENTED

1. Under the substantive federal law of collective bargaining agreements, is parol evidence as to bargaining history between an employer and a union admissible in evidence for the purpose of explaining or adding to the terms of their written collective bargaining agreement?

2. Where there is a promise by an employer to pay an unspecified amount of severance pay upon a plant removal or closing, does the subsequent failure of the parties to agree on the amount of severance pay upon the plant closing preclude the union from judicial relief?

STATUTE INVOLVED

The statutory provision involved is Section 301(a) of the Labor-Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C., Sec. 185(a), which provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

This case involves a suit for breach of a promise to pay severance pay contained in a collective bargaining agreement between the respondent and Local 990 of the International Union of Electrical, Radio and Machine Workers AFL-CIO (R. 23a-26a).

The only language in the written collective bargaining agreement between respondent and Local 990 referring to severance pay was as follows:

> "Termination of Operations.
>
> "110. It is hereby agreed that in the event the Company takes any steps to close down operations in the Mount Clemens area plant or plants, this matter, including the question of severance pay, shall become subject to negotiations upon twenty-four (24) hours' notice by either party. It is further agreed and understood that paragraph 103 shall not apply in the event of failure to reach agreement in such negotiations" (R. 221a).

Paragraph 103 provided:

> "The Union agrees not to call any strikes, stoppages or slowdowns during the terms of this Agreement unless and until the Grievance and Arbitration procedures as provided for herein have been exhausted, or if the employer refuses to abide by a decision of an arbitrator" (R. 220a).

The "termination of operations" language had appeared in each collective bargaining agreement between the respondent and Local 990 since October 1, 1952 (R. 216a, 224a). It had been inserted because of the union's appre-

hension that the respondent was about to relocate its plant (R. 60a, 61a, 66a-68a).

In the summer of 1961, the union suspected respondent might be planning to move and requested negotiations on severance pay (R. 93a, 94a, 96a). This request was denied by respondent, which stated it did not feel that selling five screw machines constituted steps to close the operations (R. 97a). The respondent continued until December 8, 1961 to deny it was closing (R. 166a, 167a).

Some time in November, 1961, a notice from respondent directed to employees was posted. It stated that operations were being shut down as of the latter part of the month for the purpose of taking inventories, and that normal production would be resumed on January 4 of the following year (R. 100a). Production was stopped in accordance with the notice (R. 101a).

In the latter part of December, 1961, respondent announced that it was permanently closing down its manufacturing plant located in Mount Clemens, Michigan (R. 27a, 101a, 102a). The plant was never reopened (R. 111a).

Thereafter, respondent and union representatives had several meetings, during which severance pay was discussed, but there was never any offer by the respondent to pay any amount (R. 106a, 172a).

How Federal Question Presented

Local 990 had for many years been the exclusive bargaining representative of the employees of respondent at its Mt. Clemens, Michigan, plant, duly designated by the National Labor Relations Board (R. 30a, 40a, Appendix B, *infra*, p. 36).

The complaint in this action alleged breach of a promise to pay severance pay, contained in a collective bargaining agreement between respondent and Local 990, and requested the Court to fix a reasonable amount of severance pay as damages (R. 23a-26a, Appendix B, p. 35, *infra*.). The suit arises under Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. §185(a), 61 Stat. 156.

The case was tried before a jury. During the course of the trial, petitioners sought to introduce parol evidence as to bargaining history and negotiations to explain and add to the written language of the collective bargaining agreement and to prove the promise to pay severance pay. The trial court concluded that such evidence was admissible under the federal law of collective bargaining agreements, but refused to submit the evidence to the jury (R. 68a-70a, Appendix B, *infra*, pp. 36-38).

On the separate record, Wilbur Penzien testified as follows:

> "During negotiations of 1952, after we had gone down to South Carolina and looked over the plant that the Company had built there, and came back, and we subsequently went into negotiations. The Union, on behalf of the members, felt that it is very important that we have a severance pay clause put into our contract and through the negotiations, Mr. Dabney, who was the vice-president of the company, came in and we explained to him the position

> of the Union and our feelings about this plant they had built down there; and he, at that time, stated that they would be willing to pay severance pay if and when they shut the plant down. So, with that, he also posted a notice on the bulletin board" (R. 71a, Appendix B, p. 39).

According to Penzien, no amount was set because Dabney, the company vice-president, stated that if the company were to set an amount at that time the company would have to set up a fund to contribute toward it which would deprive the company of money which it could use to expand facilities and to make improvements in manufacturing. Dabney also said if the union did not get what it wanted the employees could strike the plant so the company would not be able to move equipment. (R. 75a, Appendix B, *infra*, p. 40).

Penzien's testimony was corroborated in all respects by Marvin Duckert and James Kandt (R. 126a, 127a, 197a, 198a, Appendix B, *infra*, pp. 44, 45, 47). Duckert quoted Dabney as saying "we will pay" (R. 127a, Appendix B, *infra* p. 45). Kandt quoted Dabney as stating, "It will be paid when it comes to the point." (R. 198a, Appendix B, *infra* p. 47.)

Penzien further testified that during the negotiations on the pension plan in the beginning of the year 1956, the company requested that the termination of operations clause be taken out of the collective bargaining agreement (R. 89a, 90a, Appendix B, *infra* pp. 42, 43). Penzien testified that Tracy who was present at these negotiations stated that if the clause were left in the collective bargaining agreement, the employees would be entitled to double severance benefits. Such statement was made several times during the course of the negotiations (R. 90a, Appendix B, p.

43). This testimony was also supported by the testimony of Duckert and Kandt (R. 132a, 202a, Appendix B, pp. 45, 48).

At the close of petitioners' proofs, respondent moved for a directed verdict (R. 205a, Appendix B, p. 48). The trial court granted the motion, concluding that the parol evidence did not establish a promise to pay severance pay. He relied on the repeated references to the Union's strike remedy if the parties were unable to agree on an amount, and said, "This is in substance saying, 'We have no agreement, you have your self-help remedy.'" (R. 208a, Appendix A, p. 30, *infra.*)

Petitioners appealed to the Michigan Supreme Court, claiming that if such evidence were admissible, it should have been submitted to the jury and that a court could award a reasonable amount of severance pay as damages where the parties had failed to agree on an amount. (Brief for Plaintiffs and Appellants. Statement of Questions Involved, Appendix B, *infra*, p. 48.)

Three members of the Michigan Supreme Court voted for affirmance of the trial court holding that such evidence should have been submitted to the jury under the federal law of collective bargaining agreements, but there was no error since the excluded evidence showed "the question of severance pay was never finalized." (Appendix A, *infra*, p. 25).

Five members of the Michigan Supreme Court concurred in affirmance on the sole ground that the written language of the collective bargaining agreement failed "to bind defendant to pay severance allowances," in effect holding that, as a matter of federal law, parol evidence as to collective bargaining and negotiations was admissible to explain or complete a written collective bargaining agreement. (Appendix A, *infra*, p. 26).

REASONS FOR GRANTING THE WRIT

1. The opinion of five members, a majority, of the Michigan Supreme Court appears to be in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Pacific Northwest Bell Telephone Co. v. Communications Workers*, 310 F.2d 244 (1962).

The five member opinion of the Michigan Supreme Court merely stated that "paragraph 110 of the collective bargaining agreement • • • contains none of the material terms essential to a contractually binding undertaking." (Appendix A, p. 26.)

In the *Communications Workers* case, *supra*, the question was whether the parties had agreed to arbitrate a specific dispute. The Court stated:

> "We turn to the questions raised by the district court's refusal to consider bargaining history.
>
> "The first question related to the parol evidence rule. Appellee asserts (and apparently the district court agreed) that evidence of bargaining history in this case would serve to change, vary and contradict the terms of the agreement; and that all prior understandings must be held merged into the expressions of the written contract.
>
> "We cannot agree. It simply cannot be said that as to the arbitrability of disciplinary suspension the contract's meaning is plain when the fact is that the contract is silent. As has been frequently pointed out, agreements of this sort are far different in nature and purpose from the ordinary commercial agreement. They are in effect a compact of self-government. As pointed out in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 1960, 363 U.S. 574, 580-581:

> 'Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators.'
>
> * * * * *
>
> "We conclude that the parol evidence rule does not apply here to preclude examination of the bargaining history upon the question of the arbitrability of this dispute" (p. 247).

2. The majority opinion of the Michigan Supreme Court is believed to be erroneous and the conflicting decision of the Court of Appeals for the Ninth Circuit in the *Communications Workers* case, *supra*, correct. The error in the majority opinion in the present case arises from the application of general rules of ordinary commercial contracts to collective bargaining agreements.

In *J. I. Case Company v. N.L.R.B.*, 321 U.S. 332 (1944) this Court explained the basic difference between a collective bargaining agreement and an ordinary contract of employment comparing the collective bargaining agreement to schedules of rates and rules for utility services or tariffs established by a carrier.

That a collective bargaining agreement is more than a mere commercial contract was restated by this Court in *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960), where the Court said, at pp. 578-580:

> "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly

anticipate. See *Shulman, Reason, Contract and Law in Labor Relations,* 68 Harv. L. Rev. 999, 1004-1005. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. As one observor has put it:

> "• • • It is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. *There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties.* One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.'"

(The quotation is from Cox, *Reflections Upon Labor Aribtration,* 72 Harv. L. Rev. 1482, 1498-1499; emphasis supplied.)

As was stated by Justice Brennan in his concurring opinion:

> "Words in a collective bargaining agreement, rightly viewed by the Court to be the charter in-

> strument of a system of industrial self-government, like words in a statute, are to be understood only by *reference to the background* which gave rise to their inclusion * * *. Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause— *considerations of the milieu in which the clause is negotiated* and of the national labor policy", 363 U.S. 569, 570 (emphasis supplied.)

Recognizing the distinction between ordinary commercial contracts and collective bargaining agreements, this Court has directed federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements. *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957). And, in actions under Section 301 of the Labor-Management Relations Act, state courts are obligated to apply federal law in substantive matters. *Local 174, Teamsters v. Lucas Flour Company,* 369 U.S. 95 (1962).

The majority opinion in the present case has made "the words of the contract the exclusive source of the rights and duties" of those under a collective bargaining agreement and in so doing has disregarded the nature of a collective bargaining agreement as discussed in the opinions of this Court.

3. The minority opinion of the Michigan Supreme Court is believed to be erroneous and contrary to the national labor policy because it favors a strike remedy, rather than a judicial remedy for breach of a collective bargaining agreement.

If an ordinary employer had promised to pay severance pay (compensation for past services) to an individual, with the amount to be later agreed upon, after perform-

ance of the services and upon failure to agree on an amount, a reasonable amount would be allowed by a court.

In the present case, all services had been performed. But, the promise to pay severance pay had been made to a labor organization representing a large group of employees and having an effective economic remedy in its ability to strike. At the time the promise was made, references to the strike remedy were also made. The minority opinion in this case construed these facts to find no contract enforceable by a court and relegated the union to its strike remedy.

Normally, references to a self-help remedy which a contracting party may have do not destroy the contract or limit the contracting party to such self-help remedy. Here the references to the strike remedy were held to preclude judicial intervention.

In *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1947), this Court, discussing the legislative history of Section 301 of the Labor-Management Relations Act, said at page 455:

> "• • • the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."

Allied Oil Workers Union v. Ethyl Corporation (5th Cir. 1965), 341 F. 2d 47, was a Section 301 suit brought by a union for a declaratory judgment of rights under a collective bargaining agreement which contained no compulsory arbitration clause; the employer claimed that self-help was the proper remedy available to the union. The court

found it had jurisdiction over the matter, stating at page 49:

> "• • • it is in a case such as this that we find Section 301 to have its most salutary effect, namely, the avoidance of industrial conflict by providing the parties to an honest dispute over the interpretation of their contract with a peaceful alternative to economic disruption."

The minority opinion in the present case clearly conflicts with the federal policy, favoring judicial enforcement of collective bargaining agreements to promote industrial peace.

4. Both of the questions presented in this case are of importance in the developing substantive federal law of collective bargaining agreements.

As indicated by the number of cases on the parol evidence question cited in the minority opinion in this case, the question often arises as to whether a written collective bargaining agreement may be supplemented by evidence as to bargaining history and oral representations and promises. An authoritative answer to this question would be most helpful to those negotiating collective bargaining agreements who are confronted with oral representations which the other party declines to put into the written contract, or which are inadvertently omitted from the writing.

The extent to which courts will assist in the enforcement of collective bargaining agreements is raised by the second question. Most of the litigation under Section 301 has involved efforts to enforce compulsory arbitration clauses in collective bargaining agreements. With the increasing tendency to limit arbitration clauses in such contracts, the courts will be called upon to interpret and enforce other provisions of these agreements.

The second question is of particular importance in situations like the present where a plant has closed and the bargaining power of the union is greatly diminished. Plant closings and removals are occurring with more frequency and employer promises with respect to closings and removals are most likely to be indefinite. When a plant has closed, the only effective recourse which a union and the employees have is to judicial processes.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 24, 1965.

APPENDIX A

OPINIONS OF THE SUPREME COURT OF THE STATE OF MICHIGAN #13 OCTOBER 1964

(Filed January 5, 1965)

STATE OF MICHIGAN—Supreme Court

Wilbur Penzien, James Kandt, Lawrence De Pew, Margaret Singler, Edward Summers, Bernhard Stark, individually and on behalf of a class similarly situated; and Local No. 990 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, a voluntary unincorporated association,

Plaintiffs and Appellants,

v.

Dielectric Products Engineering Company, Inc., a Michigan corporation,

Defendant and Appellee.

Before the Entire Bench.

ADAMS, J.

Plaintiffs sued for severance pay claimed by them as third party beneficiaries of a collective bargaining agreement, basing their claim on this contract language:

"Termination of Operations.

"110. It is hereby agreed that in the event the Company takes any steps to close down operations in the Mount Clemens area plant or plants, this

matter including the question of severance pay, shall become subject to negotiation upon twenty-four (24) hours notice by either party. It is further understood and agreed that paragraph 103 shall not apply in the event of failure to reach agreement in such negotiations."

Paragraph 103 reads:

"The Union agrees not to call any strikes, stoppages or slowdowns during the terms of this Agreement unless and until the Grievance and Arbitration procedures as provided for herein have been exhausted, or if the employer refuses to abide by a decision of an arbitrator."

Paragraph 110 was inserted in the bargaining agreement on September 29, 1952, because of fears of the employees that the company might close down its Mount Clemens plant. The company had located a plant in another State. Two members of the union negotiating committee inspected the new factory and were disturbed over the size of the facilities. On their return to Michigan, negotiations took place which led to Paragraph 110. It was continued in subsequent agreements.

In the summer of 1961, the union again suspected appellee might be planning to move. On August 25, 1961, the union requested that negotiations be held on the question of severance pay. The request was denied, as was a similar request dated October 4, 1961. By letter dated October 17, 1961, the union, referring to Paragraph 110, informed the appellee of its intention to arbitrate the question of severance pay. Arbitration never took place because "the parties couldn't get together on arbitration so the period then went until the time there was hardly anyone left in the plant and there was no one to arbitrate the matter."

In November, 1961, a notice from the appellee directed to its employees was posted. It stated that operations were being shut down as of the latter part of the month to take inventories and that normal production would be resumed on January 4, 1962. There followed a number of meetings between the company and the union. At a meeting on the 8th of December, it became obvious to the union that Dielectric was closing down. In the latter part of December, appellee notified the union it was closing its Mount Clemens plant. Meetings were continued, but there was never any offer by the company to pay severance benefits.

At the close of plaintiffs' proofs, defendant's motion for a directed verdict on the ground that the plaintiffs had failed to prove a cause of action was granted.

Is the agreement so clear and unambiguous there is no need to resort to other evidence to determine its meaning? *Dunham v. Packing & Provision Co.*, 100 Mich 75; *Gardner v. City National Bank & Trust Co.*, 267 Mich 270; *Paul v. University Motor Sales Co.*, 283 Mich 587. The key words in Paragraph 110 are: "question," "negotiation," "failure" and "agreement." Standard definitions of these words are as follows:

> *Question:* "A subject or aspect that is in dispute, open for discussion, or to be inquired into: • • • a subject or point of debate • • •."—Webster's Third New International Dictionary (1964). "A subject or point of investigation, examination or debate; theme of inquiry; problem; matter to be inquired into; as a delicate or doubtful question." —Black's Law Dictionary (4th ed) (1951).
>
> *Negotiation:* "The action or process of negotiating • • •." *Negotiate:* "To communicate or confer with another so as to arrive at the settlement of

some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something * * *."—Webster's Third New International Dictionary (1964). *Negotiation:* "The deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or other business transaction."—Black's Law Dictionary (4th ed) (1951).

Failure: "Omission of performance of an action or task; esp: neglect of an assigned, expected, or appropriate action * * *; want of success; lack of satisfactory performance * * *."—Webster's Third New International Dictionary (1964). "Abandonment or defeat * * *. Deficiency, want, or lack; ineffectualness; inefficiency as measured by some legal standard; an unsuccessful attempt. * * *"—Black's Law Dictionary (4th ed) (1951).

Agreement: "The act of agreeing or coming to a mutual arrangement * * * oneness of opinion * * * harmonious understanding * * * an arrangement * * * as to a course of action."—Webster's Third New International Dictionary (1964). "A coming or knitting together of minds; a coming together in opinion or determination; the coming together in accord of two minds on a given proposition; in law a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances; the consent of two or more persons concurring respecting the transmission of some property, right, or benefits, with the view of contracting an obligation, a mutual obligation."—Black's Law Dictionary (4th ed) (1951).

The plain language of the contract provides for dealing with a "question" that is to be subject to "negotiation" if the company takes steps to close. If the negotiations do

not succeed ("failure") and no "agreement" is reached, then the union may have recourse to its remedies of strikes, stoppages or slowdowns which are otherwise barred under Paragraph 103 of the contract. But, it is contended, parol evidence as to collective bargaining negotiations is admissible to explain the terms of the executed collective bargaining agreement because the substantive Federal law controls as to admissibility.

The Federal law relating to the inclusion of parol evidence of negotiations leading to a collective bargaining agreement is far from settled. Cases such as *Pacific Telephone & Telegraph Company v. Communications Workers of America,* 199 F Supp 689 (1961), say that, as to the history of the negotiations, the evidence "cannot be used to change, vary or contradict the terms of the written instrument and all prior and contemporaneous agreements were merged therein and cannot be shown by parol evidence." To the same effect see *National Labor Relations Board v. Gulf Atlantic Warehouse Co.,* 291 F2d 475 (1961):

> "We think that ordinarily the language of the contract as finally agreed upon must be construed by the courts in accordance with ordinary rules of construction without reference to the give and take of the bargaining sessions which produced the final terminology. Otherwise we would abandon completely the parol evidence rule when dealing with this type of contract."

This holding on the parol evidence rule as it relates to a labor contract was criticized in *National Labor Relations Board v. Perkins Machine Company,* 326 F2d 488 (1964):

> "We could not agree with the seeming suggestion in that opinion that the parol evidence rule required the waiver to be contained within the four corners of the written agreement."

Other Federal cases state:

> "Bargaining agreements, to be binding upon Company and employees, should expressly define their respective obligations as well as the limits on or extent of the employee's rights."—*Nichols v. National Tube Co.*, 122 F Supp 726, 732 (1954).
>
> "If the contract in question were ambiguous or 'doubtful,' extrinsic evidence, particularly evidence which would indicate the contemporaneous understanding of the parties, would be admissible as an aid in construction of the disputed terms."—*Lewis v. Hixson*, 174 F Supp 241, 248 (1959).
>
> "The law is clear that where the language of the contract is ambiguous, the court can look to such extrinsic evidence as the parties' conduct, the statements of its representatives, and past practice to aid in interpretation. (citing cases)."—*United Electrical, Radio and Machine Workers v. General Electric Company*, 208 F Supp 870, 872 (1962).

The trend of the Federal decisions is away from a rigid adherence to the parol evidence rule. *Independent Soap Workers v. Procter & Gamble Manufacturing Company*, 314 F2d 38 (1963), cites the rule that words in a collective bargaining agreement are to be interpreted in the background and light of bargaining history. To the same effect, see *Pacific Northwest Bell Telephone Company v. Communications Workers of America*, 310 F2d 244 (1962); *Local Union No. 787, International Union of Electrical, Radio and Machine Workers, AFL-CIO, v. Collins Radio Company*, 317 F2d 214 (1963); *Independent Petroleum Workers v. American Oil Company*, 324 F2d 903 (1963). A statement by Mr. Justice Brennan in his concurring opinion in *United Steelworkers of America v. American Manufacturing Co.*, 363 US 564, 570 (80 S Ct 1363, 1364) (1960), is indicative of that trend:

> "Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, * * * are to be understood only by *reference to the background* which gave rise to their inclusion. * * * Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause—*considerations of the milieu in which the clause is negotiated* * * *." (Emphasis supplied.)

Reading the above cases together, it would appear that the rule is correctly stated in appellants' brief as follows:

> "Parol evidence as to bargaining history may be used to explain or to add to the terms of collective bargaining agreements, but not to contradict such agreement."

The parol evidence which appellants sought to introduce consisted of statements made during the course of negotiations. It was received by the court in the absence of the jury. The testimony most favorable to the appellants was given by Wilbur Penzien, Marvin Duckert and James Kandt, members of the negotiating committee.

> Wilbur Penzien—"They [the company] would be willing to pay severance pay if and when they shut the plant down. * * * He [Dabney, Vice-President] stated that if the Company were to set an amount at that time they would have to set up a fund to contribute towards it and it would take funds away from them that they could use to expand facilities * * *. And along with that he stated that they would put this clause [Paragraph 110] into the contract and if the Union did not get what they wanted through negotiations they could strike the plant and they wouldn't be able, the Company wouldn't be able to take any of the facilities, the machinery or anything out of there and he also cited that the Union would perhaps use the same tactics

they used in March and April of 1952 when we had a strike for 5 weeks over a wage increase.

"He said at that time that, 'If you fellows don't get what you want,' he said, 'you can go to work and throw a ring around this plant with your pickets.' * * *

"Joseph Bauman who was Personnel Director at the time also stated that if the Union didn't get what they wanted they would perhaps buy up all the carpet tacks in Mount Clemens and distribute them along the driveway so that no trucks or anything could get out of there."

Marvin Duckert—"It was then stated that you have this right—we will pay— * * *. They mentioned in the event we are not willing to or if we do shut it down and we don't reach an agreement upon the amount, you could tie us up in the same way, we wouldn't be able to move anything out of the shop because the other union would not allow picket lines."

James Kandt—"Dabney was called into the meeting and he said, 'I don't know what you fellows have got to worry about.' He said, 'You could always throw a picket line around the place like you did when we had our strike for five weeks. But one of the things the company objects to is to the setting money into severance, as it might hurt our credit rating. It is a big thing to the company and it might hurt our credit rating.' and things like that. He said, 'I wish you fellows would hold off. It will be paid when it comes to the point.' Like I said before, he said it wouldn't be satisfactory, that 'You could draw a picket line out there and settle on that basis.' That was the crux of it."

The evidence serves to explain the terms of the contract and does not, taken in context, contradict it. It would have been a proper consideration for the jury.

The trial judge, in directing a verdict, considered all of the evidence. The exclusion of the parol evidence from the jury would not be prejudicial error if he was correct in entering verdict for the defendant. *Larkin v. Mitchell & Rowland Lumber Co.*, 42 Mich 296. A new trial will not be granted unless the error committed was prejudicial. *Britten v. Updyke,* 357 Mich 466. To what extent are appellants' contentions reinforced by the parol evidence? The testimony most favorable to appellants, together with other testimony by the same witnesses, if construed with the plain language of Paragraph 110, in the minds of reasonable men can lead to only one conclusion—the question of severance pay was never finalized. *Garbacz v. Grand Trunk Western Railway Company,* 323 Mich. 7; *United States Fire Insurance Company v. Grand Trunk Western Railroad Company,* 344 Mich. 270.

Since there was no agreement for severance pay, the problem of determining the amount, in the absence of an express agreement as to amount, need not be considered. Likewise, it is not necessary to consider whether the grievance procedure contained in the contract was available to plaintiffs or, if it was available, whether their failure to exhaust it would have been a bar to this action.

The trial court is affirmed. Costs to appellee.

John R. Dethmers, Harry F. Kelly concurred with Adams, J.

Signed: Paul L. Adams
Harry F. Kelly
John R. Dethmers

Endorsed: Filed
January 5, 1965

Donald F. Winters
Clerk, Supreme Court

CONCURRING OPINION

STATE OF MICHIGAN

SUPREME COURT

Wilbur Penzien, James Kandt, Lawrence De Pew, Margaret Singler, Edward Summers, Bernhard Stark, individually and on behalf of a class similarly situated; and Local No. 990 of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, a voluntary unincorporated association,

Plaintiffs and Appellants,

v.

Dielectric Products Engineering Company, Inc., a Michigan corporation,

Defendant and Appellee.

BEFORE THE ENTIRE BENCH

SOURIS, J. (concurring)

I concur in affirmance, but solely on the ground that paragraph 110 of the collective bargaining agreement fails to bind defendant to pay severance allowances. It contains none of the material terms essential to a contractually binding undertaking. Hansen v. Catsman, 371 Mich 79, and Professional Facilities v. Marks, 373 Mich 673.

Thomas M. Kavanagh, Eugene F. Black, Otis M. Smith, Michael D. O'Hara concurred with Souris, J.

Signed: Theodore Souris.
Michael D. O'Hara.
Thomas M. Kavanagh.
Eugene F. Black.
Otis M. Smith.

Endorsed:
Filed January 5, 1965.

Donald F. Winters,
Clerk, Supreme Court.

JUDGMENT OF THE SUPREME COURT OF THE STATE OF MICHIGAN

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifth day of January in the year of our Lord, one thousand nine hundred sixty-five.

Present the Honorable Thomas M. Kavanagh, Chief Justice, John R. Dethmers, Harry F. Kelly, Eugene F. Black, Theodore Souris, Otis M. Smith, Michael D. O'Hara, Paul L. Adams, Associate Justices.

Wilbur Penzien, et al.,
Plaintiffs and Appellants,

vs. 50534

Dielectric Products Engineering Co., Inc.,
Defendant

This cause having been brought to this Court by appeal from Macomb Circuit Court, and having been argued by counsel, and due deliberation had thereon, it is now ordered by the Court, that the judgment of the Circuit Court be and the same is hereby affirmed, with costs to defendant.

ORAL OPINION OF THE CIRCUIT COURT FOR THE COUNTY OF MACOMB, MICHIGAN

(From transcript of record R. 206a-213a)

"The Court: This is a suit by the third party beneficiaries under a collective bargaining agreement, the contract or collective bargaining agreement, being between Local 990, representing the employees and the employer Ironrite; and later known as Dielectric.

"(45-J) The suit, in substance, alleges that the plaintiffs are beneficiaries of the provisions of Section 110, or paragraph 110, of the latest collective bargaining agreement between the parties. This provision was originally placed in the contract in 1952, and continued, and last appeared in the agreement of 1958, which was extended thereafter, lastly in 1961, with numerous supplements and addendums, and includes a pension agreement of 1955 formalized on the 27th of March, 1956.

"The principal paragraph is as follows: (Quoting): 'It is hereby agreed that in the event the Company takes any steps to close down operations in the Mount Clemens area plant, or plants, this matter, including the question of severance pay, shall become subject to negotiations upon twenty-four hours' notice by either party. It is further understood and agreed that paragraph 103 shall not apply in the event of failure to reach agreement in such negotiations,' the reference to paragraph 103 as to the 'no strike' clause of the contract.

"The prinicipal issue in the case is whether this language in and of itself, or as added to or subtracted from, by the history and background and relationship of the par-

ties, constitutes a valid and binding agreement between the parties of which the beneficiaries can enforce by a proceeding at law.

"There is the incidental question as to whether this is a contract or something less than that. Is there something about (46-J) it which, in the overall view of the collecting bargaining agreement, is the subject of arbitration; and whether or not arbitration is a condition precedent under Michigan law.

"The Court heard extensive testimony on the history and the background; the give-and-take of the negotiations table, both oral and recorded memoranda of recollection; things that would be excluded, in a large part, in the ordinary suit at law on a contract. But they were received in an effort, received by the Court itself and not in the presence of the jury, received in an effort to apply Federal Common Law to the collective bargaining agreement.

"The principal decision supporting the reception of this evidence is Telephone Company v. Communication Workers, 9th Circuit, 1962, 310 Federal 2d, 244. This, and the other cases preceding it, established that the Federal Courts attempt to place themselves in the position and relive the situations that went on at the negotiations or bargaining table.

"The plaintiff states that the defendant is attempting to insert additional words following the word 'question'. They say that the defendant's position is substantially inserting the words 'whether or not,' the 'question of whether or not to pay severance pay'. The plaintiff says that their position is more closely similar to adding only the word 'amount', the 'question of amount of severance pay'. (47-J) The Court heard the history and background and the other evidence in the case on the theory that any words can have

a meaning over and above the meaning usually attributed to it and the language, where there is a peculiar relationship between the parties. In some sections of the country a word means something different than it does in other sections. Parties might use a word as a term of art and it might have a greater or broader or different meaning. I find nothing in the history or background or circumstances, that would give such a meaning to the collective bargaining language.

"The word 'question' is not ambiguous in the ordinary language to which we are then referred. Looking at Bouviers on Words and Phrases, we find that the word 'question' means something in controversy, subject of debate, matter to inquire into. This is the ordinary meaning of the word 'question'. And it clearly has shown here from the testimony that it was something in controversy, and the history disclosed that. It was a subject of debate and the history disclosed that. It was a matter to inquire into and the history disclosed that, but it disclosed no more. Part of the history said, to make the method, it would tie up funds, and clearly, anything that would constitute a legal obligation upon the Company would tie up funds. Anything that was less than that which would tie up funds would not be legally enforceable.

"(48-J) The parties, by the history and background, made clear that the right to strike, throw carpet tacks, to put a ring around the plant—in other words, self help was reserved on short notice, 24 hours. This is in substance saying, 'we have no agreement, you have your self help remedy.'

"There was negotiations and efforts on either side to—one, to take the language out—the other, to make it more specific. But it was never resolved. One—to make a de-

termination of who was to get it, how much, what criterion to use in determining the amount. The other party said the pension agreement is a satisfaction of the ordinary wage concessions that we made in May, promising that if we got out before October of 1961, we would retroactively increase them. These things were concessions but they never came to a solution of the debate.

"The union had good reason to believe that the Company was going to move out. In January, 1961, the contract makes reference that it might move out. This agreement says in paragraph 3, in the event ironer manufacturing operations are discontinued by the Company in its Mount Clemens plant because of bankruptcy or sale of the plant, or if the ironer manufacturing rights are sold, or if manufacture of the present ironer line is transferred by the Company to another location prior to October 1, 1961, then hourly rates as set forth in Exhibit A to the agreement of October 1, 1961, will be reinstated retroactively to January 23, 1961, and the difference between the (49-J) rates actually paid and the rates set forth will be paid in a lump sum to each employee within thirty days of such occurrence.

"So it was well known that there was the likelihood. Of course, the Board of Directors has made a resolution and there is history to this effect. No one can say definitely but the evidence was there and the union knew it. The union officers were not babes in the woods. They understood when things went on, when there was a purchasing plant in far away North Carolina, they knew about it. They knew and could see what was happening here and for some reason, what it was we know not, but for some reason did not elect to call the strike that they could have called with the information at hand.

"So no contract was ever achieved for severance pay and the Court and jury cannot now make one for the parties. There is some argument that the arbitrator could not make a contract but the Court and jury could. The Court and jury are in no better position nor generally considered to be in as good a position as an arbitrator, with the special confidence that the Federal Court feels that they have in these proceedings and what the Federal Courts feel that the arbitrators have in the subject matter.

"But assume we did have a contract and I was to live up to my duty which was to charge the jury on the correct measure of damages. What measure of damages would I charge them? (50-J) Howe v. North, 69 Michigan, 272, says (Quoting): 'It is error for the Court to say, "give a full and just compensation". It is error for a Court to say, "Give what you feel is just and right"'. And yet under these facts I don't know how I could charge any more. We should not look to procedure for answers and yet we can look to procedure to determine how far we are from the mark.

"In Gustov v. Clark, 190 Michigan, 381, the Court is to give the correct measure of damages and confine the jury in clear and explicit terms to the proofs regarding damages.

"Also, in Meyer v. McQueen, 85 Michigan 156—what items, when I say to the jury, are the correct measure of damages? Should all employees back to '52 get it, or more logically, certainly not more than those who were employed in the time the last contract was signed and extended in 1961. It seemed that that would be more logical but there is no testimony or guide to determine this. The Company, after all, did remain in Mount Clemens far longer after it signed the '52 agreement and it had been there before.

It had been there only six years at that time and it remained for nine. It would seem that only the last period when the contract was put in and after the pension agreement, could there possibly be any liability. But that is merely speculating as to a guide. Who is to get it? How many hours? Do wage rates make a difference or is it to be flat?

"(51-J) Plaintiffs even assert that the length of time that an employee might have been unemployed afterwards would make a difference. Certainly there is no means for me to determine or measure a damage. Why? Because there was no meeting of the minds, there was no contract upon it. We can only determine means and minds from the external signs, and the external signs, and the external signs were just what it said in paragraph 110.

"There is some thought as to whether there was a breach of contract to negotiate and that was raised more by the Court than by counsel. It was never seriously urged and yet I meditated long and hard over that question. But all of the facts indicate that there was negotiations and there was not a breach of the contract to negotiate.

"Plaintiff says negotiation, after all, is just to reach an agreement and the only corollary from that it was never reached here; that they are not yet there when they negotiate. There was negotiation in the way of the retroactive increasing contract. There was negotiation in the way of the pension severance. There was negotiation in the way of offering $150.00 or $75.00 per year to the employees employed the last year.

"So it has never been seriously urged that there was a breach of the obligation to negotiate. And even if there were, the contract itself, the provision spells out what the penalty of this is to be. It says in its concluding para-

graph (Quoting): (52-J) 'It is further understood and agreed that paragraph 103 shall not apply in the event of failure to reach agreement in such negogtiations.' So that failure was contemplated and the self help remedy of strike was placed as the one and only means of enforcement.

"Now, to go on to talk just a little bit about the arbitration—I think it is dictum in this opinion. The Supreme Court, on Appeal, if they decide that this should be retried, should certainly cover and guide the next examiner of this trial, should it go to a new trial, and that is—should it first go to arbitration and what is the state of Michigan Law.

"I feel that the contract itself here excludes the possibility of negotiations, of arbitration, for two reasons: One—paragraph 100 says that no revisions are to be considered by the arbitrator, and therefore the arbitrator would be, by the paragraph itself, excluded from the subject matter. But more important than that, the language says that the remedy is self help.

"I find that it is not necessary then to go into the question of the applicability of Cortez and the more recent cases that have been cited by counsel. The case has been excellently briefed, excellently presented, but I feel that this is not the forum for the decision of the matter. There is no general obligation to pay severance pay. The law comprehends this and therefore provides unemployment compensation, provides for right to withdraw your services from the market; and these are remedies that are applicable, apart from an express agreement to the contrary (53-J). There is no express agreement to the contrary stated here. The Court must find then that there is no cause for action and a motion for directed verdict is granted."

APPENDIX B

EXCERPTS FROM PLEADINGS

Excerpts from Amended Complaint.

"8. Defendant Ironrite, during the year 1952, promised to pay severance benefits to individual plaintiffs and all other members of their class if, in the future, it closed down its Mt. Clemens operations, which promise was reflected in the collective bargaining agreement negotiated during said year and all successive agreements" (R. 23a).

* * * * *

"12. In breach of its promises and agreements to make severance payments to the individual plaintiffs and their class, defendant Ironrite has absolutely failed and refused and continues to fail and refuse to pay any amounts in severance pay to any individual plaintiff or member of their class" (R. 25a).

* * * * *

"14. The individual plaintiffs and their class have suffered grievous damages by reason of said breach of contract on the part of defendant, and each of them is entitled to receive, as damages, a reasonable amount as severance benefits" (R. 25a).

* * * * *

"Wherefore, plaintiffs and all members of the class on whose behalf this suit is brought demand judgment against the defendant for the reasonable value of the severance pay benefits to which they are entitled, as damages, in the aggregate amount of $2,000,000.00, together with costs of suit, attorney fees and interest from the date of the closing of the plant" (R. 26a).

Excerpts from Answer to Amended Complaint

"10. * * * Further answering, defendant avers that the Union has since 1955 been the exclusive bargaining representative of the employees of defendant, duly designated by the National Labor Relations Board pursuant to the provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, Public Law 101, 80th Congress, and as subsequently amended. The obligations of defendant and the rights of its employees are established by said Act and by the agreements between defendant and the Union made and in effect from time to time. * * *" (R 30a).

Excerpts from Reply to Answer to Amended Complaint

"10. In reply to paragraph 10 of said answer, plaintiffs admit that plaintiff Local 990 has, since 1955, been the exclusive bargaining representative of the employees of defendant duly designated by the National Labor Relations Board pursuant to the applicable federal law. * * *" (R. 40a).

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Excerpts of proceedings during and testimony of Wilbur Penzien.

"(R. 68a) Q. Will you relate to the best of your knowledge what was said by each side during the course of those discussions?

"Mr. Johnston: Just a moment witness.

"The Court: I think at this time the Jury may take a recess.

(Recess held from 2:52 o'clock P.M. to 3:12 o'clcok P.M.)

"Mr. Johnston: If your Honor please, it is quite obvious that we are now getting into an area which is quite far removed from that which is background for the circumstances. I think we are getting into an area which is very dangerous and we think that the conversations that took place between these negotiating parties, which led up to the 1952 contract, they are give and take and (R. 69a) the negotiations that they must have engaged in in order to arrive at a final contract, we think are all merged in the contract itself and that it is not proper to permit either side, either labor or management, to testify to this Jury of all of those things which were discussed during the course of these negotiations.

"• • • Mr. Livingston: Well, I think that the clause in question is ambiguous itself, aside from the applicability of parol evidence rule to collective bargaining contracts, which I will go a little later on the Ninth Circuit case which seems to hold that the parol evidence rule is not applicable to collective bargaining contracts. If we look at this clause itself we see it has ambiguity.

• • • • •

"The Court: The Court permitted history and background to be received on the theory that terms could become terms of art, arising out of the circumstances leading up to the negotiations. The particular question and answer posed before the Court upon this ruling is a relatively narrow (72-A) one. So with the conversation which took place at the bargaining table, leading up to the first insertion of the clause—which is the subject matter of the lawsuit—puts the subject matter of this lawsuit into the final labor agreement which was in 1952.

It is the position of the parties, parties plaintiff, that the parol evidence rule does not apply in this type of litigation. It is the position of the defendant that it should apply and for a Jury in a common law forum.

The courts seem to have, Federal Courts seem to have first gone to a rule whereby the evidence could come in to show the intent and positions that the parties were standing prior to this jump; and then more recent cases seem to go one step farther and let the evidence in with even a fuller and broader use, always, however, with the theory that this is showing the intent of the parties (R. 70a) and not to vary or change the terms of the document itself.

It is basic in the jury practice that the construction of the contract is to be one for the court rather than for the jury—and it seems to be, to me, to be the only way to work this litigation out of the knot that it is in—to present, by receiving the oral testimony by the Court, and later in the Charge, the Court interpreting the contract for the jury. This will serve two benefits—one, if this matter (73-A) goes on appeal, which it well might, that this testimony will be before the higher tribunal for evaluation and for guidance in case of a necessary new trial. But more important than that, the construction of contracts has always been the function of the Court and it seems to me that we must proceed that way in this instance.

Now the testimony will be received in the absence of the jury. We will have to notify the jury when to come back. We will have to feel our way out as we go on this, and when we get to the point where you think this is not covered by this ruling, we can bring the jury back, and in the meantime we will have to proceed without a jury."

* * * * *

PENZIEN, WILBUR, being previously sworn, resumed the stand and testified further on his oath as follows:

Direct Examination (continuing)

* * * * *

"(R. 71a) Q. Do you recall the last question?

"A. I—

(Reporter repeated question as follows: Will you relate to the best of your knowledge what was said by each side during the course of those discussions?)

"Q. Answer it please.

"A. During negotiations of 1952, after we had gone down to South Carolina and looked over the plant that the Company had built there, and came back, and we subsequently went into negotiations. The Union, on behalf of the members, felt that it is very important that we have a severance pay clause put into our contract and through the negotiations. Mr. Dabney who was the vice-president of the Company, came in and we explained to him the position of the Union and our feelings about this plant they had built down there; and he, at that time, stated that they would be willing to pay severance pay if and when they shut the plant down. So, with that, he also posted a notice on the bulletin board."

* * * * *

"(R. 73a) Q. Now during your discussions with Mr. Dabney can you state whether or not anything was said with respect to the setting up of a fund or paying any amount as far as a severance plan was concerned?

"Mr. Johnston: This is objected to, if your Honor please, for the reasons heretofore stated.

"The Court: All right, and the words should be repeated as accurately as possible, just what was said. May proceed. Objection overruled."

* * * * *

"(R. 75a) Q. And on this 29th day of September, was that, was the statement or the conversation which you were starting to relate about Mr. Dabney—did it occur on that date?

"A. Yes, sir.

"(79-A) Q. And did he make any statement relating to the amount of severance pay on that date?

"Mr. Johnston: This is objected to for the reasons previously stated.

"The Court: Overruled.

"A. Yes, there was a statement made by Mr. Dabney. He stated that if the Company were to set an amount at that time they would have to set up a fund to contribute towards it and it would take funds away from them that they could use to expand facilities and to make improvements in the manufacture of their production. And along with that he stated that they would put this clause into the contract and if the Union did not get what they wanted through negotiations they could strike the plant and they wouldn't be able, the Company wouldn't be able to take any of the facilities, the machinery or anything out of there and he also cited that the Union would perhaps use the same tactics they used in March and April of 1952 when we had a strike for 5 weeks over a wage increase.

"He said at that time that, 'If you fellows don't get what you want,' he said, 'you can go to work and throw a ring around this plant with your pickets.' He says, 'We wouldn't be able to move anything out of this plant' and the Union's position at the time was that if you agreed to that plan, 'let's put it in the contract,' and they were agreeable to it.

"Q. Did you make that statement to Mr. Dabney?

"(R. 76a) (80-A) A. Yes.

"Q. And do you know who drafted this language?

"A. Mr. James Tracy who was the Company attorney and is present in this room, drafted, to the best of my knowledge, all the contractual language used during the course of negotiations between the Union and the Company.

"Q. Did that include this particular clause?

"A. Yes it did, yes it did.

"Q. Now do you recall any statements being made by anyone else on behalf of the Company respecting severance pay, the amount of severance pay?

"Mr. Johnston: Objection.

"The Court: Go ahead, overruled.

"A. Yes, Mr. Tracy also stated that the Company couldn't go out and agree on a settlement of severance pay which they probably would never have to use the clause because they were not moving out and had no intentions of moving out.

"Q. Do you recall any other statements made by any representatives of management concerning severance pay?

"A. Yes.

"Mr. Johnston: Same objection.

"The Court: Yes, overruled.

"A. Joseph Bauman who was Personnel Director at the time also stated that if the Union didn't get what they wanted they would perhaps buy up all the carpet tacks in Mount Clemens (81-A) and distribute them along the driveway so that no trucks or anything could get out of there.

"Q. Do you recall at what session this statement was made to you by Mr. Bauman?

"A. It was in the last session of the contract negotiations when we arrived at the severance pay article in the contract."

• • • • •

"(R. 85a). Q. I hand you what has been marked as Plaintiff's Exhibit 14 and ask you if you can identify that paper?

"A. Yes I can.

"(92-A) Q. And what is it please?

"A. It is an agreement dated October 4, 1955, dealing with a pension plan to be effective January 1st of 1956."

* * * * *

"(R. 88a) Q. During the negotiations on this pension plan, was there any discussion with respect to the severance pay provision in the collective bargaining agreement?

"A. Yes there was.

"(96-A) Mr. Johnston: Object to it if your Honor please, immaterial, irrelevant—whatever was said during the course of those negotiations were, we believed, merged in the agreement finalized on March 27th.

"The Court: All right, I will sustain the objection.

"Q. Can you state, Mr. Penzien, whether or not during the course of those negotiations any request was made (R. 89a) by any representative of the Company to eliminate the severance pay provision and collective bargaining agreement?

"Mr. Johnston: If your Honor please, likewise objected to for the same reasons. All demands, any discussions, offers, conversations or verbal agreements maintained were merged in the agreement, finalized in the writing between the parties.

"Mr. Livingston: I should like to be heard on that, if the Court please.

"The Court: The jury may take a recess at this time. (Jury adjourned from the court room at 11:10 o'clock A.M.)

"Mr. Livingston: This is not offered as to contradict or even explain the terms of the pension agreement, but

this is being offered as admission on the part of the Company as to the meaning of the severance pay provision and the collective bargaining, said admissions of their obligations to pay severance. That is the purpose for this line of (97-A) questioning is designed to elicit.

"The Court: Let me hear the testimony and we will take it under objections the same as the previous separate record, in a sense, and then I will rule on it after I have heard it as to whether it may go to the jury.

"Mr. Livingston: All right, sir.

"The Court: You may answer the question then. If you want it repeated you may have it.

"Q. Do you recall the question, Mr. Penzien?

"A. The question was—was there any request by the Company to take this provision out of the contract?

"Q. That's right, out of the collective bargaining contract.

"A. That's right, out of the collective bargaining contract—I recall that very definitely because Mr. Tracy (90-A) was also present at the negotiations and he made the statement that if this clause was left in the collective bargaining agreement the people would be—by the people I mean the Union members, myself and all the other members of the Local—would be entitled to double benefits if it was allowed to remain in the collective bargaining agreement and we took the position that this is a collective bargaining agreement and this here is a pension agreement which are two separate and distinct agreements."

Excerpt of proceedings during and testimony of Marvin Duckert:

"(R. 125a) Q. Do you recall any discussions relating to the payment of severance benefits between the union and the company?

"A. Yes.

"Mr. Johnston: If your Honor please, I am not going to repeat this objection over these questions but we object for all purposes to this witness or any other testifying as to conversations between he and his committee and representatives of the union, on the ground that all of these conversations had to be a give-and-take for bargaining sessions, and that the demands, most of which one side had yielded or the other, and all of these matters are finally merged in the contract.

"The Court: All right, I will rule on it that it is receivable under which I have classified as a separate record and under my previous ruling. We would not insist on you repeating it. I guess when we have a jury present, I think it is not wise to get into these continuing (R. 126a) objections, but I think possibly without the jury there is no need to make your continuing objections. All right, overruled, you may answer it.

"Q. All right, would you tell us when, where and what was said at these discussions relating to severance pay?

"(6-B) A. There was some discussions as I recall involving about an amount that should be negotiated into the agreement. The company's objection was that if this were the case, to set an amount at that time, we may not be satisfied with it at the time of termination or—and also in addition to it, this will tie up company funds. We would then have to start funding this plan and the company was anticipating the expansion, improvement in machinery and so forth. This would tie up funds that could be used to create more jobs and make our jobs more secure.

"Towards the end of discussions, and we were getting near a contract deadline as usually happened in contract negotiations, Mr. Richard Dabney, who was executive vice-president, I believe, of the company at that time, entered into the negotiations and assured the union in every way possible that the company had no intentions whatsoever of moving.

"The net result of all these discussions being a letter or notice posted on the bulletin board to all employees that the company had no intentions of moving.

"Q. Did Mr. Dabney or anyone else make a statement with respect to the right of the union to strike?

"A. They told us, in the language that was eventually agreed to—the matter came up of negotiations as to whether it would be a moval of the plant for just a short distance and then to negotiate on it for their rights. On the matter of termination of operations completely (R. 127a) where the plant would just shut down, (7-B) it was then stated that you have this right—we will pay—depending on what time it happens and so forth, what the benefits will be. In the event—

"Q. Excuse me, who made this statement?

"A. Mr. Dabney.

"Q. Do you know when he made it?

"A. I would say during the meeting on the 29th, August 29th or September.

"Q. Was the 29th your last day of negotiations?

"A. I believe it was. We had had a strike on a wage reopener in the spring of 1952, a very effective strike insofar as nobody crossing the picket lines and so forth and the company had taken, I believe, taken the position then that we could tie them up fairly well. They mentioned in the event we are not willing to or if we do shut it down and we don't reach an agreement upon the amount, you could tie us up in the same way, we wouldn't be able to move anything out of the shop because the other union would not allow picket lines and so forth."

* * * * *

"(R. 132a) A. During the course of the meeting somebody in the negotiating committee will make a statement and it will be backed up—the same thing with the company—like Mr. Tracy would make a statement and who-

ever on the company team would back up Mr. Tracy's argument—and at this time Mr. Tracy's plan of incorporating severance pay into pension agreement meant we would collect double, meant severance pay under existing agreement and he said we would be collecting also under the pension agreement—and the company. Mr. Tracy, Mr. Turner, the whole company committee objected to paying double.

"Q. Well, did Mr. Tracy, to your recollection, make that statement?

"A. Mr. Tracy did make that statement.

"Q. Do you recall when he made the statement?

"A. I don't think it was made just at one time, it was made on a number of occasions by the company during the negotiations (14-B) in an effort for us to withdraw our demands for severance pay under the pension proposals."

Excerpts of proceedings during and testimony of James Kandt:

"(R. 196a) Mr. Livingston: I believe the other questions which I have of this witness, your Honor, are directed to the events and discussions which this Court has ruled should be made the subject of a separate record. I might (13-I) also state to your Honor, if it would help with respect to the instructions to the jury, that this is our last witness. When we conclude this, we expect to rest.

"(R. 197a) The Court: I think you could just take the jury into their room at this time.

(Jury adjourned to their jury room at 11:20 o'clock A.M.)

"Q. Referring back to the 1952 negotiations, would you relate to us, to the best of your recollection, of any dissussions relating to the plant relocation and severance pay and be as specific as you can with respect to names and dates.

"Mr. Johnston: If your Honor please—just one moment Mr. Kandt—we wish to state for the record our objection

to the reception of this evidence for any purpose either general or on the separate record. I am not going to jump up each time a question is answered, but we would like you, in accordance with your Honor's previous ruling in this one regard, to give us the benefit of a continuing objection to these questions because they are merged in the final contract between the parties.

"The Court: All right, you have your objection, overruled, received as part of the final record.

"A. In September we did sign our final contract. We negotiated and part of that was our severance pay. And Richard Dabney, who was president of the company at that time, normally didn't sit in on our meetings. But we thought the severance pay contract was important to us in regards to the amount of (14-I) money that could be set in it, and due to the fact that it was a big issue, Dabney was called into the meeting and he said, 'I don't know what you fellows have got to worry about'. He said, 'You could always throw a picket line around the place like you did when we had our strike for five weeks. But one of the things the company objects to is to the setting money into severance, as it might hurt our credit rating. It is a big thing to the company and it might hurt (R. 198a) our credit rating' and things like that. He said, 'I wish you fellows would hold off. It will be paid when it comes to the point'. Like I said before, he said it wouldn't be satisfactory, that 'You could draw a picket line out there and settle on that basis'. That was the crux of it."

* * * * *

"(R. 202a) (19-I) Q. Now, do you recall during the negotiations on the details of the severance plan, whether any representatives of the company made any request that the severance pay provision of the collective bargaining contract be eliminated?

"A. That's right, it would be Jim Tracy, the company's attorney, and Joe Bauman, personnel director.

"Q. Do you recall the discussions with respect to that?

"A. Well, they said that if we didn't have the severance pay clause on our pension plan—if we did have a severance pay clause in our contract, which we did—they again—the company's attorney and the personnel director said that if something should happen the company closed down operations that they would be paying twice because we would be collecting once under the pension and the other under severance pay."

Excerpts of proceedings at close of plaintiffs' case:

"(R. 205a) Mr. Tracy: If the Court please, plaintiffs having rested their case, defendant moves to dismiss plaintiffs' case and asks the Court to direct the jury that it render a verdict in favor of the defendant on the ground plaintiff has not made out a case at law."

STATEMENT OF QUESTIONS INVOLVED FROM BRIEF FOR PLAINTIFFS AND APPELLANTS

I. Is parol evidence as to collective bargaining negotiations between a union and an employer admissible in evidence before a jury to explain the terms of the executed collective bargaining agreement between them, under the substantive federal law of collective bargaining agreements?

II. Where there is a promise to pay severance pay and labor is performed in consideration of said promise, does the failure of the parties to agree on an amount of severance pay preclude recovery of any such pay on termination of employment under the substantive federal law of collective bargaining agreements?